APPENDIX

The pertinent provisions of the National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C. 151 *et seq.*), are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

SEC. 10 * * *

(e) * * * Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and en-

forcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. * * *

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OCTOBER TERM, 1943.

No. 657.

WESTERN CARTRIDGE COMPANY, WINCHESTER REPEATING ARMS COMPANY DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW.

ALLAN SESERMAN,
Attorney for Petitioner.

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The petitioner respectfully presents for further consideration certain detailed information which had been omitted from the petitioner's previous petition because the petitioner was of the opinion that such matters were argument and that full opportunity to be heard on those matters would have been given later had this Honorable Court granted its petition for certiorari. In requesting reconsideration, the petitioner respectfully requests this Honorable Court to weigh the similarity between the facts of the instant case and those contained in the case of *Montgomery Ward & Co. v. National Labor Relations Board,* 103 Fed. (2d) 47.

In the Montgomery Ward case the Court stated: "This record is full of instances of hostile and searching examination of witnesses who might be expected to be favorable

to the Company . . . while similar action does not appear as to witnesses favorable to the complainant. The extreme activity of the examiner in questioning of witnesses is quite evident . . . Counsel for the Board seems to have been proficient and this exaggerated participation by the examiner is not commendable—it is likely, as it did here, to shade into partisan activity." In the instant case the Trial Examiner conducted a hostile and searching examination of all the witnesses for the respondent. Not only does the record show that the examination was hostile, but that it was tricky and highly unethical as well, and indicated a prosecutor's mind rather than that of an arbiter. An illustration of such hostility is appended hereto and marked "Appendix A."

In the instant case also the record shows that the Trial Examiner did not ask a single question of the main witness for the complainant (R. pp. 60-91). Nor in fact will the record show that there was any sincere examination conducted by the Trial Examiner to ascertain the facts from the witnesses for the Board, but that every witness for the respondent was taken in hand for cross-examination by the Trial Examiner.

I pray this Honorable Court's indulgence and I do not intend that this Honorable Court should feel that I am not cognizant of the fact that a judge may inquire into facts and question witnesses in order to clarify the facts, the better to enable him to render a decision; but when a cross-examination of witnesses is conducted by a Trial Examiner for the obvious purpose of discrediting the witnesses' testimony, it results immediately in activity bordering upon partiality—partiality in the sense that the Trial Examiner then becomes personally interested in the outcome of the proceedings. As the Court below stated in its decision (fol. 969), "The reason the respondent gave for the discharge of Amato was his calling a 'coursellor of em-

ployees,' who had the rank of a superintendent without that title, an obscene name. There was apparently credible evidence to support a finding that Amato did do just that . . . The trial examiner saw fit to believe the denial instead of the witnesses who testified that they heard Amato call Bernstein the vile name. The board found likewise." Is it reasonable to deduce that, since the Court below found that there was credible evidence to support a finding to substantiate the respondent's position (that being the weight of the testimony) a reason be found why the Trial Examiner made a finding as he did against the weight of the testimony? We respectfully submit there was a reason. That reason was the bias and prejudice of the Trial Examiner towards the respondent. How else could a Trial Examiner arrive at a conclusion that several witnesses for the respondent who asserted they heard this witness call the superintendent this vile name, as against the lone denial by the complaining ex-employee who supplemented his denial by stating, "Maybe I should have" (R. p. 76), except that the Trial Examiner was satisfied that he himself had discredited the witnesses of the respondent by his cross-examination of them? Such interest becomes prejudicial, especially since it is highly improbable that the Trial Examiner would admit his own inability to injure the credibility of the witnesses for the respondent. I dare say that many attorneys and counsellors in the past have felt at various times in connection with litigation before a trial judge that they discredited opposing witnesses by means of cross-examination, but not always has the judge or jury, as the case may be, agreed with such attorneys.

Is this not one of those instances covered by the language of this Honorable Court in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, wherein this Honorable Court stated: "Regulatory commissions

have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. *West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), supra, p. 70; West Ohio Gas Co. v. Public Utilities Comm'n (No. 2)*, 294 U.S. 79; *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U.S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (*St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. *Morgan v. United States*, 298 U.S. 468, 480, 481; *Interstate Commerce Comm'n v. Louisville & N.R. Co., supra.* The right to such a hearing is one of 'the rudiments of fair play' (*Chicago, M. & St. P. Ry. Co. v. Polt*, 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co. v. Public Utilities Comm'n (No. 1), (No. 2), supra; Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 682. Cf. *Norwegian Nitrogen Co. v. United States, supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored''? Cf. *Morgan* v. *United States*, 304 U.S. 1.

Likewise, as in the case of Montgomery Ward & Co. *supra*, the Trial Examiner in the instant case, as a result of his cross-examination (R. pp. 328-331), brought out a new charge against the respondent and, against the objection of counsel for the Board as well as that of the respondent, insisted that a new complaint be issued. He

thereafter was successful in securing a stipulation disposing of such charge. He then proceeded to use this disposed-of charge as the basis for his findings. The Court below treated this matter as an "inconsequential issue." I cannot believe that this Honorable Court would permit such an innuendo to remain on the record unchallenged.

Having discussed the matter and manner in which the Trial Examiner discredited the witnesses of the respondent, we come next to the language of the Court below with reference to the Trial Examiner as follows: "In so doing he did much to destroy any faith in his impartiality . . ." What did the Court below mean? Did the Court below mean that the respondent would be in a position to lose faith in his impartiality, or does the statement mean that upon judicial review the record sustains the fact that he did destroy any faith in his impartiality? I respectfully submit that the Court below must have come to the conclusion, in writing such an opinion, that he did in fact destroy any faith in his impartiality. Yet they do not conclude that he was partial, and I respectfully state that I cannot reconcile the basis for such omission so to find. The added statement by the Court below—"and had this been a close case his conduct might have been sufficient cause for a denial of this petition"—departs entirely from accepted judicial proceedings, and appears to circumvent a finding that the Trial Examiner was partial. I cannot agree with the statement of the Court below when it states: "The result was right, and though the trial examiner's conduct may have caused the respondent needless trouble and expense, whatever harm was done to the cause of good administration of the Act did not make the order itself erroneous." The Trial Examiner's conduct not only caused the respondent needless trouble and expense, but destroyed any faith in the administration of the National Labor Relations Act by the self-appointed judges of the Board who participate

in cases such as these in the prosecution of charges about which they should exercise or show no interest whatsoever towards either party.

What harm can result to the administration of the Act if, as the petitioner claims, it had not received a fair hearing, and this Honorable Court grants certiorari, and after a hearing directs the Court below to order the case remanded to the National Labor Relations Board for a new hearing? The petitioning corporation is a responsible company and is able to pay its financial debts and carry out its obligations and responsibilities. The principle involved does not harm the National Labor Relations Board, nor does it discredit the Act. On the contrary, such a rehearing would confirm the faith that litigants have enjoyed towards the judiciary, especially where the resulting consequences, if any, accrue to the petitioner. To permit the language of the Court below to remain as a final determination will do more harm in confusing the intent of this Honorable Court in the face of existing decisions.

At the argument in the Court below, the petitioner stressed the necessity of disposing of the issue of the unfair hearing rather than delving into the nonexistence of substantial evidence to support the findings. This was necessary because the question of the fair hearing became fundamental, and, as is alleged in the case at bar, since the Trial Examiner was partial, no credence could be given to the disposition of the factual evidence as announced in his recommendations and accepted by the Board as its own.

The petitioner therefore respectfully appeals to the discretion of this Honorable Court and requests that it be given an opportunity to be heard on the many points involved herein which were necessarily omitted because of the desire by the petitioner to limit itself within the scope of the rules of this Honorable Court in being as brief as possible, fully realizing, however, that the granting of the

writ for certiorari does not mean that this Honorable Court will eventually substantiate the position of the petitioner but rather will give the opportunity sought by the petitioner to be fully heard on all its contentions. A clear and concise opinion from this Honorable Court will do much to prevent the confusion that will result should the decision of the Court below be permitted to stand.

Respectfully submitted,

ALLAN SESERMAN.

"Trial Examiner Whittemore: Just one point which I think was perhaps inadvertently overlooked in asking you about this diagram.

"Do you recall where it was that you were when you heard this name? If so, will you mark it with a circle and a dot in the center?

"The Witness: Approximately there. (Marking diagram.)

"Trial Examiner Whittemore: Now where were you facing when you heard that name? Will you indicate that with a short line from the top, pointing in the direction in which you were facing with an arrow?

"Mr. Paradise: He is indicating a southerly direction, Mr. Examiner, slightly to the east.

"Trial Examiner Whittemore: Well, if that is the case, your back was turned to him?

"The Witness: That is right.

"Trial Examiner Whittemore: About how far away would you say it was?

"The Witness: Two or three steps.

"Trial Examiner Whittemore: Six to ten feet, would you say? How far do you travel per step?

"The Witness: I can show you.

"Trial Examiner Whittemore: About three feet?

"The Witness: I never measured my steps. I would say it was about six feet away, if I made a guess, five to six feet away.

"Trial Examiner Whittemore: Your back was turned to him?

"The Witness: That is right.

"Trial Examiner Whittemore: And if this is correct, at least your side was turned towards Baker?

"The Witness: Yes, sir.

"Trial Examiner Whittemore: About how far away was Baker from you?

"The Witness: About how far away was Baker from me?

"Trial Examiner Whittemore: Yes. If this plan is accurate, Baker was just about the same distance from you that Amato was. Is that correct?

"The Witness: That is the way it looks, yes.

"Trial Examiner Whittemore: Were you looking at Baker?

"The Witness: No.

"Trial Examiner Whittemore: With all the noise, it is quite conceivable that Baker made the statement; is it not?

"The Witness: No, I think I could have recognized Baker's voice as compared with Amato's voice.

"Trial Examiner Whittemore: You only think you could?

"The Witness: That is right.

"Trial Examiner Whittemore: Why didn't you ask one or the other, to find out which it was?

"The Witness: Why didn't I ask one or the other to find out which it was?

"Trial Examiner Whittemore: Yes, as you say now you only think it was Amato.

"The Witness: I felt sure to myself that it was Amato.

"Trial Examiner Whittemore: Why did you feel sure, if you did not ask him?

"The Witness: Because I had just been talking to him and heard his voice.

"Trial Examiner Whittemore: He didn't call you any name when you were talking to him, did he?

"The Witness: No.

"Trial Examiner Whittemore: Is there anything that took place in the conversation which you have related which would give rise to his calling you a name?

"The Witness: No, sir.

"Trial Examiner Whittemore: But you assumed that that was the name which he called you?

"The Witness: I assumed that that was the name which he called me? I heard the name.

"Trial Examiner Whittemore: Can you give any explanation as to why he should have called you that name?

"The Witness: No, I can't give any direct explanation.

"Trial Examiner Whittemore: Were you not curious to find out at the time?

"The Witness: I was surprised.

"Trial Examiner Whittemore: Well, there was a possibility that you might have misunderstood, was there not?

"The Witness: I don't think there was. I thought I would go back to Mr. Boak's office and talk it over, at least.

"Trial Examiner Whittemore: You are now testifying, however, that it might have been Baker?

"The Witness: I don't testify that. I would recognize Baker's voice.

"Trial Examiner Whittemore: Do you deny that it might have been Baker?

"The Witness: Well it never entered my mind that it might have been Baker.

"Trial Examiner Whittemore: You are convinced that it must have been Amato?

"The Witness: That is right.

"Trial Examiner Whittemore: But nothing in Amato's conversation occurred which led you to that belief, or nothing occurred in Amato's conversation which would cause him to make that remark?

"Now, why did you think it must have been Amato?

"The Witness: He had a resentful tone. I would say that.

"Trial Examiner Whittemore: But he didn't call you any names while he was talking with you?

"The Witness: No, sir.

"Trial Examiner Whittemore: Well, in answering him, do you recall whether or not your voice expressed any emotion?

"The Witness: I don't think it did. I think I had my natural voice.

"Trial Examiner Whittemore: Did you have to raise your voice to talk to him because of the noise of the machines?

"The Witness: No, sir. There are not any machines there, but just work benches in that vicinity.

"Trial Examiner Whittemore: Do you know the definition of the word 'prig'?

"The Witness: Do I know the definition of it?

"Trial Examiner Whittemore: Yes.

"The Witness: Well, do you mean, that can be found in the dictionary?

"Trial Examiner Whittemore: Yes.

"The Witness: Well, it is a sticker, or something of that nature.

"Trial Examiner Whittemore: How do you spell the word I just asked you the definition of in my question?

"The Witness: P-r-i-c-k.

"Trial Examiner Whittemore: I will ask the reporter what he took down when I asked the question.

"(Question read.)

"The Witness: Oh, prig, p-r-i-g?

"Trial Examiner Whittemore: I am how far from you?

"The Witness: I think that was put rather tricky; I was not expecting anything like that.

"Trial Examiner Whittemore: I am not asking for any explanation, but I am asking you about how far I am away from you.

"The Witness: Five or six feet.

"Trial Examiner Whittemore: That is all."